

Comment

Congressional Intent and the ERA: A Proposed New Analysis

The proposed equal rights amendment [ERA]¹ to the United States Constitution, passed by the House of Representatives October 12, 1971,² and by the Senate March 22, 1972,³ remains today a matter of unique legal controversy. Although the original seven year period allowed by Congress for ratification expired March 22, 1979, an extension of time voted by Congress last year allows ratification of the proposed amendment until June 30, 1982.⁴ The extension, if constitutionally valid,⁵ gives a new life to the once moribund ERA.⁶

This Comment will examine the effects of ERA ratification by an investigation of congressional intent behind the enactment of the ERA. Further exploration will be made of the exceptions Congress proposed to the general principle of the ERA, and a new schema is proposed for the adjudication of future ERA cases that vitiates some of the difficulties involved in the congressional schema. The proposed schema, though differing in analysis from the one of Congress, produces similar results to that of Congress and arguably has a more explicit textual basis in the ERA.

I. SEX-BASED CLASSIFICATIONS PRIOR TO THE ERA

Constitutional attack on sex-based classifications at present must generally be based upon the equal protection clause of the fourteenth amendment.⁷ Equal protection analysis considers the nature of the classification dealt with by some state action, the nature of the individual interest affected by that action, and the nature of the governmental interest furthered by that action.⁸

1. The text of the proposed equal rights amendment is as follows:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.

Section 2. The Congress shall have the power to enforce by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

86 Stat. 1523 (1972).

2. 117 CONG. REC. 35815 (1971).

3. 118 CONG. REC. 9598 (1972).

4. See New York Times, November 6, 1978, at 51, col. 5.

5. The constitutionality of the extension has been questioned. Almond, *Can E.R.A. Be Saved?*, 64 AM. B.A.J. 1504 (1978). Under present case law, however, it appears that the propriety of the extension is a political question not subject to review in the courts. See *Coleman v. Miller*, 307 U.S. 433 (1939).

6. At the time of publication of this Comment, 35 of the 38 States required for ratification had approved the ERA.

7. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1063-74 (1978).

8. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).

At the time of the House ratification of the ERA, no Supreme Court decision had ever held that a classification based upon sex was unconstitutional.⁹ The reason for this failure was that sex-based classifications were originally judged under the rational basis standard.¹⁰ Under this standard, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."¹¹

After the House ratification and before the Senate debates began, the Supreme Court in *Reed v. Reed*¹² struck down an Idaho law giving men preference over women for appointment as administrator of a decedent relative's estate. Although the decision purported to apply the rational basis standard,¹³ the Court appeared to be adopting *sub rosa* a more stringent test for sex-based classifications.¹⁴

In its next pronouncement on sex-based classifications, *Frontiero v. Richardson*,¹⁵ a plurality of the Court held that classifications based upon sex were suspect. Thus, the Court required the state to show that a compelling interest was served by the statute and that no less restrictive means of achieving that interest existed for the classification to pass constitutional muster.¹⁶ Such a standard of scrutiny is tantamount to *per se* unconstitutionality.¹⁷

The Court, however, retreated from this position, declining to hold sex-based classifications suspect in several cases following *Frontiero*.¹⁸ To add to the uncertainty, in *Kahn v. Shevin*,¹⁹ the Court upheld the constitutionality of a Florida statute granting property tax exemptions only to widows, apparently using a test akin to the traditional rational basis test.²⁰ An emerging two-tiered standard appeared to be implicit in the

9. *E.g.*, 117 CONG. REC. 35306 (1971) (remarks of Rep. Edwards).

10. For a garish demonstration of this standard's application to a sex-based classification, see *Goesaert v. Cleary*, 335 U.S. 464 (1948).

11. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

12. 404 U.S. 71 (1971). The case was decided November 22, 1971.

13. *Id.* at 76: "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective. . . ."

14. See Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163, 172-73.

15. 411 U.S. 677 (1973).

16. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

17. The only case employing a strict scrutiny standard in which the classification was upheld was *Korematsu v. United States*, 323 U.S. 214 (1944).

18. See *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

19. 416 U.S. 351 (1974).

20. *Id.* at 355: "A state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution." (brackets and ellipsis in original; capitalization as in original) (citing *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959), which applied the traditional rational basis test).

Court's decisions: a more stringent standard for classifications that disfavored women, a test less stringent than the strict scrutiny standard of *Frontiero* but less deferential than the rational basis test, and at the same time the traditional deferential rational basis test for classifications that favored women.²¹

The validity of this analysis was undermined by the Court's decision in *Craig v. Boren*,²² which struck down differential treatment of males and females with respect to the age at which 3.2% beer could be purchased. The statute struck down disfavored males, by requiring them to be three years older than females to buy beer.²³

The doubts raised by *Craig* concerning the two-tiered analysis were justified in the Court's holding in *Orr v. Orr*,²⁴ which struck down an Alabama statute that allowed women, but not men, to receive alimony. Although the Court's opinion acknowledged that reduction of the economic disparity caused by discrimination against women was an important governmental objective,²⁵ it held that the sex-based classification employed was gratuitous.²⁶ While the statute might be justified as providing help for the needy spouse,²⁷ the Court stated that the use of sex was unnecessary for two reasons: (1) individualized hearings of the parties' relative economic circumstances were already being held,²⁸ and (2) the statute benefited only financially independent wives with needy husbands.²⁹

It is difficult to tell the ultimate effect of the Court's decision in *Orr*, but, as will be seen, the result in that case is thoroughly consistent with the goals of the ERA. *Orr* may mark the end of an era in which sex-based classifications were judged largely upon whether they were perceived by the Court as favoring women; instead the judicatory touchstone may now be whether the sex-based classification is relevant to the purpose of the statute.

II. ERA—THE BASIC PRINCIPLE

A. *Congressional Intent—Its Role in the Adjudication of the ERA*

It is assumed throughout this Comment that congressional intent will be accorded great weight by the United States Supreme Court in its future

21. See Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163, 179-81.

22. 429 U.S. 190 (1976).

23. *Id.* at 217 (Rehnquist, J., dissenting).

24. 99 S. Ct. 1102 (1979).

25. *Id.* at 1112.

26. *Id.* at 1113.

27. *Id.* at 1112.

28. *Id.* at 1113.

29. *Id.*

interpretation of the ERA. Proponents³⁰ and opponents³¹ of the ERA expressed differing views of the role of congressional intent in constitutional adjudication and the issue is not altogether free from doubt.

For example, in the House hearings on the ERA, then-Assistant Attorney General William H. Rehnquist disparaged the role of congressional legislative history in constitutional adjudication:

Logically, it would appear that legislative history would not be particularly persuasive unless it could be shown that not only the Congress, but the ratifying legislatures of three-quarters of the States were fully aware of an ambiguity in the language of the amendment, and of the legislative reports of debates which purported to clarify that ambiguity.³²

Such an objection should not defeat the role of Congress in the interpretation of the ERA for two reasons. The first is that, despite dicta in *Maxwell v. Dow* (one of the few United States Supreme Court cases to address the issue squarely) to the contrary,³³ the Supreme Court has traditionally placed great weight upon the intent of Congress in constitutional adjudication.³⁴ Indeed, this must be the case, unless one posits an unbridled discretion upon the part of the Supreme Court,³⁵ for it must be assumed that a constitutional amendment is passed for some reason and some effect is intended. The natural source for elucidation of that intent is Congress, since, in contrast to Congress, the states typically keep no legislative history from which intent can be deduced.³⁶ One might hypothesize an amendment ratified by the states with a different intent than that of Congress, but a mere hypothesis should not prevent the courts from receiving illumination from the one source unquestionably available to them.³⁷

30. See, e.g., 118 CONG. REC. 9336 (1972) (remarks of Sen. Gurney): "[T]he intention of Congress is crucial to any understanding of how it will be implemented."

31. See, e.g., 118 CONG. REC. 9342 (1972) (remarks of Sen. Fong): "All the expectations, the hopes, the anticipations, and, I fear, the speeches of the proponents of this legislation will not cause the courts to alter the language of the proposed amendment. . . ."

32. *Equal Rights for Men and Women 1971: Hearings on H.R.J. Res. 35, 208, and Related Bills, and H.R. 916 and Related Bills Before Subcommittee No. 4 of the House Committee on the Judiciary*, 92d Cong., 1st Sess. 312 (1971) (statement of William H. Rehnquist) [hereinafter cited as *House Hearings*].

33. 176 U.S. 581, 601-02 (1900). Cf. with note 22 *supra*.

34. See, e.g., *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), which pays at least lip service to the intent of Congress in passing the post-Civil War constitutional amendments. See also R. KLUGER, *SIMPLE JUSTICE* 617-41, 653-55 (1976), and Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955), for discussions of the role played by congressional history and intent in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

35. For an argument against such unbridled discretion, see generally R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). Unlike Berger, however, this Comment does not argue against an evolutionary interpretation of constitutional amendments beyond the original intent of their framers.

36. E.g., J. JACOBSTEIN & R. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* 203 (Successor Vol. to POLLACK'S *FUNDAMENTALS OF LEGAL RESEARCH*, 4th ed. 1977): "Generally, state legislatures do not publish their debates, committee reports, or transcripts of hearings held before legislative committees. It is not, therefore, possible to compile a legislative history for a state law as . . . for federal laws."

37. Cf., e.g.:

[I]t is not unrealistic . . . to assume notice of congressional purpose in the state

The second reason is that, even if the objection raised by then-Assistant Attorney General Rehnquist were generally valid, a showing could be made that, in the case of the ERA, the states were in fact aware of ambiguities in the amendment and the clarifications of those ambiguities in the debates and reports. The struggles of women's groups and ERA proponents and the measure's final triumph in Congress were the subject of widespread national publicity.³⁸ In addition, commentators since the congressional passage of the ERA have adopted either the congressional view or the almost identical view espoused by an influential Yale Law Journal article³⁹ on the subject in discussing the measure.⁴⁰ The implication is clear that the ratifying states knew the congressional solution to the ambiguities of the ERA⁴¹ and approved that solution. To believe otherwise is to attempt to replace the widely circulated, extensively

legislatures. A showing of ratification on the basis of an understanding different from that revealed by congressional materials must carry the burden of proof. And, of course, the ratifying states are a chorus of voices; a discordant one among them proves little.

Bickel, *supra* note 34, at 7.

38. The New York Times, for example, ran 16 news stories relating to the passage of the ERA by Congress from March 25, 1971, when House subcommittee hearings began, to March 24, 1972, immediately following final passage of the measure. The skeptical should see generally THE EQUAL RIGHTS AMENDMENT PROJECT, *THE EQUAL RIGHTS AMENDMENT: A BIBLIOGRAPHICAL STUDY* (1976).

39. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) [hereinafter cited as YALE LAW JOURNAL].

40. Commentators adopting those views include: A. BINGAMAN, A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT ON STATE LAWS AND INSTITUTIONS 18-21 (1975) (relying on YALE LAW JOURNAL, *supra* note 39); B. BROWN, A. FREEDMAN, H. KATZ, & A. PRICE, WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS 13-19 (1977) (relying on congressional history); S. ROSS, THE RIGHTS OF WOMEN: THE BASIC ACLU GUIDE TO A WOMAN'S RIGHTS 20-21 (1973); *The Equal Rights Amendment*, HUMAN RIGHTS 54 (July 1971) (symposium citing Rita E. Hauser, a proponent of the ERA); Ferrell, *The Equal Rights Amendment to the United States Constitution—Areas of Controversy*, 6 URB. LAW. 853, 863 (1974) (relying upon legislative history); Comment, *The Impact of the Equal Rights Amendment on the New York State Alimony Statute*, 24 BUFF. L. REV. 395 (1975); Comment, *The Equal Rights Amendment: Constraint on Discretion in Family Law*, 22 BUFF. L. REV. 917, 918 (1973) ("consistent with legislative history and intent of the amendment"); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AGAINST AN UNQUALIFIED EQUAL RIGHTS AMENDMENT (1950). Other commentators, without specifying what standard of review to be employed, rely upon legislative history: L. FORD, 5 WOMEN'S LEGAL HANDBOOK ON JOB AND SEX DISCRIMINATION 1 *passim* (1974) (extensive quotations from legislative history); REPORT ON NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, TO FORM A MORE PERFECT UNION 27-30 (1976) (indicates legislative history will be important); B. BOYLAN, THE LEGAL RIGHTS OF WOMEN 121-50 (1971) (contains legislative history, arguments pro and con ERA, and testimony of sponsor, Congresswoman Martha W. Griffith in the House hearings); K. DECROW, SEXIST JUSTICE 261-89 (1974) (extensive quotations from legislative history and YALE LAW JOURNAL, *supra* note 39). Other commentators, relying upon legislative history, list a different, vaguely defined standard, e.g., THE COUNCIL OF STATE GOVERNMENTS, ALL ARE CREATED EQUAL 2 (1972) (cites to legislative history to prove equality "unqualified"). Others list no authority and cite no standard but appear to believe the approach is correct, e.g., W. BROWN, A. RUZICHO, & S. EISENMAN, STUDY OF THE OHIO REVISED CODE PRESENTED TO THE TASK FORCE FOR THE IMPLEMENTATION OF THE EQUAL RIGHTS AMENDMENT (1974). Others cite the approach as one of two possible alternatives, e.g., UNITED NATIONS CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, LAW AND THE STATUS OF WOMEN 313 (1977) (stating that other possibility is to shift the burden of proof as to constitutionality of statute to the state). The only commentators *contra* this approach suggest the ERA will make sex a suspect classification. Comment, *The Equal Rights Amendment: Its Meaning and Its Impact on Missouri Law*, 39 U. MO. L. REV. 553, 554 (1974) (citing, *inter alia*, YALE LAW JOURNAL, *supra* note 39); Note, *Equality for Men and Women, Three Approaches: Frontiero, The Equal Rights Amendment, and the Montana Equal Dignities Provision*, 35 MONT. L. REV. 325, 331 (1974) (citing no authority).

41. For the ambiguities in ERA, see *infra* section IV.

documented intention of Congress with a merely hypothetical and inaccessible contrary intention of the state legislatures ratifying the ERA.

B. *A New Constitutional Standard*

It is an elementary canon of statutory construction that knowledge of the mischief to be remedied or the cause or necessity of a law is an important extrinsic aid in the discovery of the meaning of a legislative provision.⁴² Congress thoroughly documented the reason for the necessity of the ERA during the debates, and that reason was discrimination against women.⁴³

Discrimination against women was found in many fields and in many forms. It occurred in education,⁴⁴ in labor and employment,⁴⁵ in the criminal law,⁴⁶ in the federal government,⁴⁷ as well as in other contexts.⁴⁸ A few discriminations were also found against men,⁴⁹ but the basic purpose of the ERA is to eliminate discrimination against women.⁵⁰

It does not follow, however, that because the proposed amendment was ratified by Congress to combat sex discrimination, much as the fourteenth amendment was ratified to combat racial discrimination, the ERA therefore makes sex a suspect classification in equal protection terms. Although some proponents maintained that sex discrimination was already unconstitutional under the equal protection clause⁵¹ and several

42. F. McCaffrey, *STATUTORY CONSTRUCTION* § 33 (1953).

43. *E.g.*, SENATE COMMITTEE ON THE JUDICIARY, *EQUAL RIGHTS FOR MEN AND WOMEN*, S. DOC. NO. 689, 92d Cong., 2d Sess. 6-7 (1972) [hereinafter cited as *SENATE REPORT*]; HOUSE COMMITTEE ON THE JUDICIARY, *EQUAL RIGHTS FOR MEN AND WOMEN*, H. R. DOC. NO. 359, 92d Cong., 1st Sess. 5-8 (1971) (separate views of Rep. Edwards and others). (Because the views of Rep. Edwards favored the unamended version of ERA that was eventually ratified by both houses of Congress, those views represent more closely those of the legislative intent of the House. For that reason, the separate views of Rep. Edwards will be cited hereinafter as *HOUSE REPORT*.)

44. *See, e.g.*, *SENATE REPORT*, *supra* note 43, at 8; *HOUSE REPORT*, *supra* note 43, at 5; 118 CONG. REC. 8901 (1972) (remarks of Sen. Bayh).

45. *E.g.*, 118 CONG. REC. 9555 (1972) (remarks of Sen. R. Byrd); *id.* at 9553 (remarks of Sen. Moss); *id.* at 9551 (remarks of Sen. Hartke); *id.* at 9548 (remarks of Sen. Tower); *id.* at 9544 (remarks of Sen. Miller); *id.* at 8894 (remarks of Sen. Mondale); 117 CONG. REC. 35804 (1971) (remarks of Rep. Badillo); *id.* at 35799 (remarks of Rep. Brasco).

46. *See, e.g.*, *SENATE REPORT*, *supra* note 43, at 7; 118 CONG. REC. 9596 (1972) (remarks of Sen. Percy); *id.* at 9552 (remarks of Sen. Symington); *id.* at 9544 (remarks of Sen. Chiles); *id.* at 9335 (remarks of Sen. Gurney); *id.* at 8906 (remarks of Sen. Cook); *id.* at 8901 (remarks of Sen. Bayh); *id.* at 8894 (remarks of Sen. Mondale); 117 CONG. REC. 35806 (1971) (remarks of Rep. Broyhill); *id.* at 35789 (remarks of Rep. Abzug).

47. *See, e.g.*, 118 CONG. REC. 9551 (1972) (remarks of Sen. Hartke) (social security and other benefits giving greater benefit to one sex than the other); *id.* at 9552 (remarks of Sen. Symington) (limitations on entry of women into military service).

48. *E.g.*, 118 CONG. REC. 9595 (1972) (remarks of Sen. Percy) (inequalities in marriage and divorce laws); 117 CONG. REC. 35318 (1971) (remarks of Rep. Ryan) (different ages of majority); 118 CONG. REC. 8901 (1972) (remarks of Sen. Bayh) (greater percentage of female juveniles punished for acts that would have been non-criminal if they had been committed by adults); *SENATE REPORT*, *supra* note 43, at 8 (restrictions on the ability of married women to contract).

49. *See* 118 CONG. REC. 8905 (1972) (remarks of Sen. Cook) (citing failure to give husband dower or curtesy rights, failure of social security to give husband survivorship benefits, and giving automatic preference to the female in child custody actions).

50. *See* 117 CONG. REC. 35791 (1971) (remarks of Rep. Ryan).

51. *See, e.g.*, 118 CONG. REC. 9550 (1972) (remarks of Sen. Tunney).

described effects consistent with making sex a suspect category,⁵² none of the leading proponents so described the ERA's effects in that way. In fact, the leading House *opponent* of the ERA suggested that sex should be a suspect category.⁵³

Rather, something more than that was intended. As the Senate ERA floor manager said: "If the Supreme Court were to hold that discrimination based on sex, like discrimination based on race, is inherently 'suspect' and cannot be justified in the absence of a 'compelling and overriding state interest,' then *part of the reason for the amendment would disappear*."⁵⁴

What was needed was a "new constitutional yardstick"⁵⁵—a standard that would avoid the complexities of fourteenth amendment analysis—to measure discrimination on the basis of sex. For this reason, almost all of the precedents dealing with sex-based classifications under the fourteenth amendment would be inapplicable.⁵⁶

What Congress intended the ERA to do was something more than the fourteenth amendment would do:⁵⁷ prohibit all distinctions between men and women except within very circumscribed areas of exception.⁵⁸ The basic principle was succinctly stated by Senator Birch Bayh at the beginning of the Senate debates:

The goal [of the ERA] . . . is to insure that the Federal Government, the State governments, and local governments treat each person, male, and female, on the basis of his or her own individual abilities and characteristics The principle on which the amendment is based is one on which we should all be able to agree: a person's sex should not be a factor in determining one's rights under the law.⁵⁹

Bayh's view of the ERA was shared by other Senate proponents. Sex is an "irrelevant basis" for classification,⁶⁰ and under the ERA it would no

52. *E.g.*, 117 CONG. REC. 35325 (1971) (remarks of Rep. Reid) (the ERA would shift burden of proof to federal or state governments to justify disparate treatment).

53. *See* 117 CONG. REC. 35299 (1971) (remarks of Rep. Wiggins): "[A]ny difference having a partial basis in sex should be suspect, but not automatically invalidated." *See also* HOUSE REPORT, *supra* note 43, at 4 (majority views): "[A]ny State or Federal statute classifying by sex would likewise be subject to a strict standard of scrutiny. . . ." *Cf.* notes 15, 16 and accompanying text *supra*.

54. 118 CONG. REC. 8901 (1972) (remarks of Sen. Bayh) (emphasis added).

55. *Id.* at 8906 (remarks of Sen. Cook).

56. The one exception noted by proponents would be in the area of state action. *See* HOUSE REPORT, *supra* note 43, at 7. The passage cited therein refers to "some of its other features" as being textually similar to the fourteenth amendment and hence could be interpreted *in pari materia* with that amendment. These textual similarities are not specified, but at least one other similarity has been noted. The enforcement clauses of the ERA and the fourteenth amendment are identical. *See* SENATE REPORT, *supra* note 43, at 20. This would seem to make fourteenth amendment precedent dealing with the enforcement clause applicable. *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

57. *See* 117 CONG. REC. 35787 (1971) (remarks of Rep. Eckhardt): "[T]he effect of the equal protection clause is to prohibit 'prejudicial disparities' in the law. . . . This constitutional amendment does more than that. It says we may not take into account, standing alone, the question of sex in determining the rights of men and women."

58. For the areas of exception, *see* Section III *infra*.

59. 118 CONG. REC. 8900 (1972) (remarks of Sen. Bayh) (except for ellipses, all capitalization and punctuation as in original). *Accord*, SENATE REPORT, *supra* note 43, at 2.

60. 118 CONG. REC. 9526 (1972) (remarks of Sen. Bayh). *See also id.* at 9336 (remarks of Sen. Gurney).

longer be an "allowable determinant of legal rights."⁶¹ This prohibition "is more than a mere negative statement that henceforth there can be no legally sanctioned discrimination against women. . . ."⁶² It means that governments "must set up reasonable distinctions and qualifications based not on the over-broad categorization of sex, but rather on the characteristics of individuals."⁶³

This broad and absolute prohibition against sex as a classification basis was also understood by Senate opponents as the effect of the ERA. Despite their criticisms of the prohibition as unrealistic,⁶⁴ unnatural,⁶⁵ and overly rigid,⁶⁶ and their assertion that this prohibition would strike down laws favorable to women,⁶⁷ Senate supporters of the ERA did not soften their stance. Rather, they readily conceded that such a broad-based prohibition of sexual classifications would flow from the text of the ERA.

One colloquy between Senator Ervin, the leading Senate opponent of the ERA, and Senator Bayh, the chief ERA spokesman, is particularly illuminating. Ervin charged that the ERA could be interpreted to mean that it "converts men and women into identical legal beings and confers upon men and women identical legal rights and subjects men and women to identical legal responsibilities,"⁶⁸ and that such an interpretation would necessarily be imposed upon it by the Supreme Court, because the amendment "is absolute and rigid in terms."⁶⁹

Bayh replied:

[Senator Ervin] went further to say that what we were trying to create were identical legal rights. I agree 100 per cent with [him] on that point

Identical legal rights, based on the God-given talents and skills that one human being possesses? Indeed, that is the very thing we are trying to protect and to insure.⁷⁰

Additional evidence for the Senate's view may be found in its refusal to allow amendments that would qualify its prohibitions against sexual classifications. The Senate repeatedly rejected by wide margins qualifying amendments offered by Senator Ervin, including, *inter alia*, amendments allowing laws exempting women from compulsory military laws,⁷¹

61. 118 CONG. REC. 9550 (1972) (remarks of Sen. Fulbright). *See also id.* at 9555 (remarks of Sen. Byrd).

62. *Id.* at 9547 (remarks of Sen. Stevenson).

63. *Id.*

64. *Id.* at 9319 (remarks of Sen. Stennis).

65. *Id.*

66. *Id.* at 9371 (remarks of Sen. Hansen).

67. *Id.* at 9544 (remarks of Sen. Buckley); *id.* at 9351 (remarks of Sen. Ervin); *id.* at 9087 (remarks of Sen. Long).

68. *Id.* at 9566 (remarks of Sen. Ervin).

69. *Id.*

70. *Id.* at 9575 (remarks of Sen. Bayh). HOUSE REPORT, *supra* note 43, at 6-7.

71. For the text of the proposed amendment, *see* 118 CONG. REC. 9317 (1972). The amendment was defeated 18-73. *Id.* at 9336-37.

allowing exemption of women from military combat,⁷² allowing laws protective of women,⁷³ allowing laws imposing responsibility for child support upon fathers,⁷⁴ and a substitute equal rights amendment allowing distinctions between the sexes on the basis of physiological and functional differences.⁷⁵

The same nearly-absolute prohibition of sex-based classifications was intended by the House of Representatives. The minority committee report of Representative Don Edwards and thirteen others stated:

The [ERA] . . . embodies a moral value judgment that a legal right or obligation should not depend upon sex, but other factors—factors which are common to both sexes. This judgment is rooted in the basic concern of society . . . with the right of the individual to develop his own potentiality.⁷⁶

The minority report was supported by the House majority that ratified the ERA unamended, as proposed by Representative Edwards, and is thoroughly consistent with the consensus in the Senate. One proponent said: "The basic principle underlying [ERA] is that legal rights must be determined by the actual attributes of an individual, not by sex."⁷⁷ What the ERA meant to its proponents, therefore, "is very simple: sex should not be a factor in determining the legal rights of men or women."⁷⁸ Differentiation on the basis of sex is therefore "totally precluded regardless of whether a legislature or a court considers such a classification to be 'reasonable,' 'healthy,' or beneficial to society as a whole."⁷⁹ Once again, as in the Senate, the goal of merely prohibiting sex-based discrimination was rejected in favor of ensuring full equality.⁸⁰

72. For the text of the proposed amendment, see 118 CONG. REC. 9337 (1972). The amendment was defeated 18-71. *Id.* at 9351.

73. For the texts of the proposed amendments, see 118 CONG. REC. 9351 (1972) and 118 CONG. REC. 9517 (1972). The amendments were defeated by votes of 11-75 and 14-77 respectively. *Id.* at 9370, 9523.

74. For the text of the proposed amendment, see 118 CONG. REC. 9524 (1972). The amendment was defeated 17-72. *Id.* at 9528.

75. For the text, see 118 CONG. REC. 9537 (1972). The amendment was defeated 12-78. *Id.* at 9538. Senator Ervin also offered a substitute amendment which would have submitted both the ERA and a proposed alternate constitutional amendment to the states for ratification. The proposed alternate amendment contained, *inter alia*, all the above-enumerated proposed Senate amendments to the ERA. For the text of the proposed alternative amendment, see 118 CONG. REC. 9538 (1972). That amendment, predictably, was defeated 9-82. *Id.* at 9540.

76. HOUSE REPORT, *supra* note 43, at 6-7.

77. 117 CONG. REC. 35791 (1971) (remarks of Rep. Ryan).

78. *Id.* at 35796 (remarks of Rep. O'Neill).

79. *Id.* at 35809 (remarks of Rep. Ashley).

80. See, e.g., *id.* at 35789-90:

Rep. Hanna: [T]he gentleman was trying to make clear that there is a difference, in fact, a very big distinction between pursuing the question as to whether someone has been discriminated against on the one side, and as to whether that person has a position of equality on the other.

Rep. Eckhardt: Exactly. . . .

Rep. Hanna: But it seems to me that this leads to the second point that I thought the

Opponents of the ERA in the House raised virtually the same arguments against the broad scope of the ERA as did Senate opponents: the ERA would void legitimate legal differences between the sexes;⁸¹ the prohibitions of the ERA should be narrowed;⁸² the ERA violated common sense;⁸³ and the ERA would eliminate laws favoring women.⁸⁴ In the House as in the Senate, ERA proponents did not retreat from the viewpoint that the ERA would, in general, void all legal distinctions between men and women.⁸⁵ In the House as in the Senate, ERA proponents rejected the alternative of qualifying the broad prohibitions of the ERA, defeating by a vote of 87-265⁸⁶ an amendment suggested by the majority of the Judiciary Committee that would allow exemption of women from the military draft and preserve some sexual distinctions.⁸⁷

C. *Rationale for the Congressional View*

The interpretation placed upon the language of the ERA by its partisans does not ineluctably follow from its text, but it is a plausible interpretation and, indeed, probably the most plausible.⁸⁸ Furthermore, aside from any textual reading, three factors coalesced to compel the reading placed upon the ERA by Congress as the most effective way to combat sexual discrimination.

The first factor is that historically the discriminatory legislation that prompted the ERA had been justified as favoring or protecting women.⁸⁹ Foremost among such laws were the "protective" labor laws, condemned by ERA proponents in Congress and by members of the public at the ERA hearings as discriminatory.⁹⁰ Since oppressive groups throughout history

gentlemen was trying to make, and that is . . . that there are laws which address themselves to conditions in society that may involve either men or women that with the passage of [the ERA] those laws will be predicated upon facts other than sex, [sic] which support the rationale for such laws.

Rep. Eckhardt: That is exactly correct.

81. *Id.* at 35807 (remarks of Rep. Sullivan).

82. *Id.* at 35785 (remarks of Rep. Celler).

83. *Id.* at 35784 (remarks of Rep. Wiggins).

84. *Id.* at 35788 (remarks of Rep. Abernethy).

85. *E.g., id.* at 35808-9 (remarks of Rep. Kastenmeier): "Equality with qualification is a sham. It makes a mockery of the basic principle which this body is mandated to uphold. Nothing short of total equality of rights for all individuals—one system of equality for all—is acceptable."

86. 117 CONG. REC. 35813 (1971).

87. The text of the proposed amendment, known as the Wiggins Amendment, was as follows: Sec. 2. This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people.

117 CONG. REC. 35784 (1971).

88. *Cf., e.g.,* "Frankly, I do not see how the Supreme Court can do otherwise [than hold that the ERA prohibits all legal distinctions between men and women]. The [ERA] contains no exceptions or limitations and applies in absolute terms to every situation falling within its scope." 118 CONG. REC. 9086 (1972) (remarks of Sen. Ervin).

89. *Cf., e.g.,* 1 W. BLACKSTONE, COMMENTARIES *445: "[E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England."

90. For Congressional reaction, *see, e.g.,* SENATE REPORT, *supra* note 43, at 9; HOUSE REPORT, *supra* note 43, at 6; 118 CONG. REC. 9596 (1972) (remarks of Sen. Thurmond); *id.* at 9596 (remarks of

have rationalized their actions as protective,⁹¹ and since the state might seek to justify new discriminatory legislation by calling it favorable to women,⁹² Congress believed that the safest alternative would be to abolish completely virtually all distinctions between the sexes.

The second reason for adopting a broad-based prohibition was its simplicity. Because ERA proponents believed the courts had failed to meet their responsibilities in the field of sex discrimination,⁹³ they were chary about entrusting the Supreme Court with an amendment that allowed a wide scope for decisionmaking.⁹⁴ Rather than soften the impact of the ERA by qualification, they preferred to cut the Gordian knot with an almost absolute prohibition of distinctions between the sexes.⁹⁵

The third reason for adopting such a broad-based prohibition was that any distinctions between men and women (other than the few exceptions recognized by Congress⁹⁶) would in themselves support the rationale of sex discrimination: that men and women are separate classes, with women unable to shoulder responsibilities and therefore in need of protection. This rationale was emphatically rejected.⁹⁷ Laws that seek to "protect" women were viewed as paternalistic.⁹⁸ In short, laws that make such invalid distinctions between the sexes are discriminatory, whether they exclude women from certain rights or responsibilities, confer special benefits, or create a separate legal status for women without assigning them to a higher or lower rank.⁹⁹

Because conferring a special status upon either sex was perceived as fostering the subordination of women, it follows both theoretically and practically that the ERA mandates equality of responsibilities as well as

Sen. Percy); *id.* at 9553 (remarks of Sen. Moss); *id.* at 9552 (remarks of Sen. Symington); *id.* at 9549 (remarks of Sen. Sparkman); *id.* at 9547 (remarks of Sen. Brooke); *id.* at 9544 (remarks of Sen. Chiles); *id.* at 9372 (remarks of Sen. Kennedy); *id.* at 9321 (remarks of Sen. Bayh); 117 CONG. REC. 35809 (1971) (remarks of Rep. Stokes); *id.* at 35806 (remarks of Rep. Broyhill); *id.* at 35799 (remarks of Rep. Ashley); *id.* at 35799 (remarks of Rep. Brasco); *id.* at 35798 (remarks of Rep. Fraser); *id.* at 35797 (remarks of Rep. Drinan); *id.* at 35796 (remarks of Rep. O'Neill); *id.* at 35788 (remarks of Rep. Abzug); *id.* at 35325 (remarks of Rep. Scheuer); *id.* at 35324 (remarks of Rep. Roy); *id.* at 35306, 35785 (remarks of Rep. Edwards).

For statements made by ERA supporters at the hearings on the amendment, see *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 10-13, 392-411, 575-77 (1970).

91. HOUSE REPORT, *supra* note 32, at 5.

92. 118 CONG. REC. 9537 (1972) (remarks of Sen. Bayh).

93. See, e.g., 117 CONG. REC. 35802 (1971) (remarks of Rep. Danielson).

94. Cf., e.g., the testimony of the sponsor of ERA during the House hearings: "I think that [the ERA would permit some distinctions to be made between men and women] but I do hope that you people quit talking about them because the thing I want the court to be told is to stop making every distinction." *House Hearings, supra* note 32, at 51 (statement of Rep. Martha Griffiths).

95. Cf. 117 CONG. REC. 35794 (1971) (remarks of Rep. Conable): "Rather than slicing the Gordian knot that courts have tied by their judicial distinctions between the legal status of male persons and female persons, the crippled amendment presented by the committee [the Wiggins Amendment] adds only a few more strands to the knot." See note 87 *supra* for the text of the Wiggins Amendment.

96. For those exceptions, see Section III *infra*.

97. Cf., e.g., 117 CONG. REC. 35801 (1971) (remarks of Rep. Mitchell).

98. *Id.* at 35809 (remarks of Rep. Stokes).

99. *Id.* at 35319 (remarks of Rep. Dwyer).

equality of rights. The right of women "is no less than the right to be taken seriously as a citizen who shares equally with men all civic responsibilities and enjoys the full complement of privileges associated with citizenship."¹⁰⁰ This yoking of rights and responsibilities occurred continually during the debates¹⁰¹ and is consistent with the policy aims discussed above.

D. *The Role of Affirmative Action*

Although it appears that Congress intended that prior anti-discrimination statutes would be unimpaired by the ERA,¹⁰² it would appear that compensatory aid to women would be precluded if the ERA is ratified. Congressional comment is less than full on this point. It was stressed again and again that quotas would not be required under the ERA,¹⁰³ the issue whether quotas would be allowed was rarely discussed.¹⁰⁴ The entire rationale supporting the ERA, however, is against such compensatory devices. Such devices would have many of the flaws associated with the "protective" laws condemned by the ERA: they would make distinctions between men and women on the basis of sex, without taking the individual's ability to perform into account.¹⁰⁵ They would create a special legal status for women, thus reinforcing sex discrimination,¹⁰⁶ and would allow sex-based distinctions that could justify discriminatory legislation in the future.¹⁰⁷

The dividing line between permissible and impermissible devices should be whether the compensatory device classifies on the basis of sex. Statutes such as Title VII of the Civil Rights Act of 1963¹⁰⁸ do not classify on that basis; instead, they classify on the basis of discriminatory and nondiscriminatory conduct. They require only that organizations not

100. *Id.* at 35311 (remarks of Rep. Abzug).

101. 118 CONG. REC. 9552 (1972) (remarks of Sen. Symington); *id.* at 9550 (remarks of Sen. Gambrell); *id.* at 9335 (remarks of Sen. Bayh); *id.* at 9334 (remarks of Sen. Percy); 117 CONG. REC. 35810 (1971) (remarks of Rep. Broomfield); *id.* at 35809 (remarks of Rep. Stokes); *id.* at 35808 (remarks of Rep. Kastenmeier); *id.* at 35798 (remarks of Rep. Fraser); *id.* at 35795 (remarks of Rep. Heckler); *id.* at 35786 (remarks of Rep. Gude); *id.* at 35311, 35313 (remarks of Rep. Abzug); *id.* at 35302 (remarks of Rep. Albert). *Contra*: "[The ERA] . . . does not say that all shall have the same duties." *Id.* at 35804 (remarks of Rep. Pepper).

102. *E.g.*, 118 CONG. REC. 8903 (1972) (remarks of Sen. Bayh), discussing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15 (1976).

103. SENATE REPORT, *supra* note 43, at 2, 11; 118 CONG. REC. 9596 (1972) (remarks of Sen. Percy); *id.* at 9554 (remarks of Sen. Moss); *id.* at 9336 (remarks of Sen. Gurney); *id.* at 8902 (remarks of Sen. Bayh).

104. The only direct reference found in the debates was: "The legal doctrines of 'separate but equal' and of 'benign quota' and 'compensatory aid' have not [aided? word apparently omitted] constitutional nor beneficial relations between the races. These theories will not provide for justice between the sexes either." 117 CONG. REC. 35317 (1971) (remarks of Rep. Thone).

105. *Cf.*, *e.g.*, SENATE REPORT, *supra* note 43, at 17.

106. *See* note 99 *supra*.

107. *See* note 92 *supra*.

108. *See* note 102 *supra*.

disregard the attributes of individuals because of an overbroad classificatory scheme. By this requirement these statutes further the goals of the ERA.¹⁰⁹

An example of what this Comment maintains to be an impermissible compensatory device under the ERA was upheld by the Washington Supreme Court in *Marchioro v. Chaney*.¹¹⁰ That court, interpreting a state equal rights provision virtually identical to the ERA,¹¹¹ upheld two state laws requiring certain political posts to be fifty percent male and fifty percent female.¹¹² The majority held that the statutes made equality actual as well as theoretical and were constitutionally permissible.¹¹³ If one assumes that the state provision is to be construed *in pari materia* with the ERA,¹¹⁴ such an interpretation is clearly wrong.

As the *Marchioro* dissent pointed out, such statutes could work discrimination against women if the two best qualified persons for the paired posts were women; despite the superior individual qualifications of the second woman, a man would have to be chosen for the second post.¹¹⁵ Thus, a showing of discrimination against either sex should not be required; the policy goals of the ERA require the fusion of the legal roles of men and women, not their balkanization. To mandate the numerical equality of men and women, however laudable it may seem as a compensatory aid for women, can in the long run only reinforce the idea that men and women are fundamentally "different" from each other in legally cognizable ways—a view entirely contradictory to the avowed goals of ERA proponents.

III. THE INTENT OF CONGRESS—A TRINITY OF EXCEPTIONS

The sweeping prohibition of sex-based classifications by the ERA is not without its exceptions, if congressional intent is accepted as the standard of interpretation for the proposed amendment. Repeatedly, the proponents of the ERA, though not denying its sweeping prohibition of sex-based classifications, claimed these exceptions would survive that sweeping prohibition. These exceptions were discussed under the rubrics

109. Cf. SENATE REPORT, *supra* note 43, at 11: "[The ERA] simply prohibits discrimination on the basis of a person's sex."

110. 582 P.2d 487 (Wash. 1978).

111. WASH. CONST. art. XXXI: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Cf. note 1 *supra*.

112. The statutes in question were WASH. REV. CODE §§ 29.42.020 and 29.42.030 (1974), which respectively required the two members of the Washington State Democratic Committee elected by county chairmen, and the chairman and vice-chairman of the committee, to be of opposite sexes.

113. 582 P.2d at 493.

114. The majority itself so assumed, citing authorities dealing with the ERA to support its holding. 582 P.2d at 491 and authorities cited therein.

115. 582 P.2d at 497 (Horowitz, J., dissenting).

of "the right of privacy,"¹¹⁶ "unique physical characteristics,"¹¹⁷ and "the power of the state to regulate cohabitation and sexual activity by unmarried persons."¹¹⁸

The first exception, the right of privacy,¹¹⁹ was explained in the debates as allowing the state to continue sexual segregation of restrooms, prison facilities, mental institutions, and other traditionally sexually segregated governmental facilities.¹²⁰

The second exception, unique physical characteristics (that is, physical characteristics unique to one sex), was used to justify the imposition of criminal liabilities to certain sexual behavior¹²¹ and to allow regulation of physical attributes found only in one sex.¹²²

The third exception, the right to regulate cohabitation and sexual activity of unmarried persons, was rarely mentioned and lightly treated during the congressional debates.¹²³ It was used to justify the segregation of male and female prisoners in prison facilities¹²⁴ and presumably it would operate to allow the state to forbid fornication and cohabitation by unmarried persons.

Although commentators have tended to follow the congressional taxonomy,¹²⁵ it appears that the effects of the ERA as envisioned by Congress cannot be subsumed under these general headings. In particular, both the right of privacy and the right of the state to regulate cohabitation and sexual activity by unmarried persons present analytical problems, and some of the ascribed effects of the unique physical characteristics exception are difficult to justify under any principled analysis.

Two assumptions must be made for the purpose of this analysis: (1) but for the exceptions enumerated, the ERA would forbid any sex-based classification by the state, and (2) in order to escape from the otherwise rigid prohibition of sex-based classifications, the exceptions must be

116. See, e.g., SENATE REPORT, *supra* note 43, at 2; HOUSE REPORT, *supra* note 43, at 7; 118 CONG. REC. 9548 (1972) (remarks of Sen. Stevenson); *id.* at 9531 (remarks of Sen. Cook); *id.* at 9336 (remarks of Sen. Gurney); 117 CONG. REC. 35809 (1971) (remarks of Rep. Ashley); *id.* at 35801 (remarks of Rep. Mitchell); *id.* at 35797 (remarks of Rep. Drinan); *id.* at 35791 (remarks of Rep. Ryan); *id.* at 35312 (remarks of Rep. Abzug).

117. See, e.g., SENATE REPORT, *supra* note 43, at 12; HOUSE REPORT, *supra* note 43, at 7; 118 CONG. REC. 9536 (1972) (remarks of Sen. Bayh); *id.* at 9336 (remarks of Sen. Gurney); 117 CONG. REC. 35808 (1971) (remarks of Rep. Kastenmeier); *id.* at 35797 (remarks of Rep. Drinan); *id.* at 35791 (remarks of Rep. Ryan).

118. SENATE REPORT, *supra* note 43, at 12; HOUSE REPORT, *supra* note 43, at 7; 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

119. The right of privacy, as delineated in *Griswold v. Connecticut*, 381 U.S. 479 (1965), is based upon a penumbra of the rights embodied in U.S. CONST. amends. I, III, IV, V, and IX. The *Griswold* decision was inserted into the Congressional Record by Senator Bayh. 118 CONG. REC. 9321 (1972).

120. E.g., 118 CONG. REC. 8904, 9331 (remarks of Sen. Bayh). *Contra*, 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

121. 118 CONG. REC. 9536 (1972) (remarks of Sen. Bayh).

122. See notes 202-04 and accompanying text *infra*.

123. See note 118 *supra*.

124. 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

125. See, e.g., YALE LAW JOURNAL, *supra* note 39, at 893-96, 900-02.

shown to be implicit in the general principle of the ERA itself or shown to be based upon an independent constitutional basis. Neither assumption requires much discussion. The mere fact of listing these three effects as "exceptions" shows an implied finding by Congress that, were it not for the additional consideration involved, the sexual classification at issue would be forbidden by the ERA. Likewise, the second assumption rests upon a belief that congressional intent must be principled and internally consistent as a prerequisite for its use in constitutional adjudication; in other words, the proponents of a constitutional amendment cannot create an *ad hoc* exception to the general scope of an amendment by mere desire.

Given those assumptions, the right of privacy exception presents difficulties. Although ostensibly based upon an independent constitutional basis, the exception envisioned by Congress does not square with the right of privacy developed in court decisions formulating that right.

The right of privacy refers to two different interests: one is the individual's interest in avoiding disclosure of personal matters;¹²⁶ the other is the individual's interest in independence in making certain important decisions¹²⁷ (particularly in matters relating to marriage, procreation, contraception, family relations, and childrearing¹²⁸). These matters are not interpreted broadly; for example, private consensual homosexual activities are not within the ambit of the right to privacy since they are not part of marriage, home, or family life.¹²⁹

The right of privacy operates as a bar to state intervention in certain areas of the individual's life viewed as necessary for personal autonomy.¹³⁰ It does not generally serve to extend the state's power over the individual.

Such an application, however, would be required for at least some of the situations in which ERA proponents foresaw the operation of that doctrine.¹³¹ Since otherwise the ERA would require sexual integration of all state-operated facilities, the right of privacy must grant affirmative power to the state to counteract that mandate and allow the state to require sexual segregation.

In some contexts, the state does have as a source of its power the interest of individuals in being left alone.¹³² Therefore, the commonly cited

126. *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).

127. *Id.*

128. *Paul v. Davis*, 424 U.S. 693, 713 (1976).

129. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (citing, *inter alia*, *Leviticus* 18:22), *aff'd mem.*, 425 U.S. 901 (1976).

130. See generally Comment, *A Taxonomy of Privacy, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976).

131. E.g., 118 CONG. REC. 9086, 9530 (1972) (remarks of Sen. Ervin) (ERA would require integration of restrooms, penal institutions, reform schools, and institutions for the mentally ill). See also 118 CONG. REC. 9334 (1972) (remarks of Sen. Ervin) (denying applicability of *Griswold*).

132. Case law does exist that would allow such a holding. See, e.g., *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (citizen's right "to be left alone" allows Congress to forbid mailing of sexually provocative advertisements to individual's home upon his request); *Breard v. Alexandria*, 341 U.S. 622 (1951) (right allows municipal ordinance forbidding door-to-door solicitation of magazine subscriptions); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (right allows city to forbid use or operation of sound trucks in public streets). See also, generally, Annot., Supreme Court's

problem of restrooms *could* be resolved by reference to the right of privacy. Since a large majority of persons would favor a continuation of single-sex restrooms, they could in effect grant the state their privacy interests in being left alone by nonintimate persons of the opposite sex.

In other contexts, however, the analysis breaks down. Assume, for example, that convicted criminals of both sexes prefer to have sexually segregated prisons after passage of the ERA. There is no privacy interest to be protected here by sexual segregation. To the extent the right of privacy is operative in this situation, it should act in conjunction with the ERA to mandate, and not to prohibit, sexual integration.

Three alternatives to the foregoing analysis were offered by Professor Thomas Emerson in testimony during the House committee hearings.¹³³ All three are questionable. The first seeks to apply the enabling clause of the ERA to extend the right of privacy: "Under the provisions authorizing Congress to implement the amendment, I would think that Congress could spell out or an appropriate State legislature, under virtue of its general authority, could spell out in detail, in some detail, what it would require in order to enforce the right of privacy."¹³⁴ The right of privacy is not mentioned in the ERA as finally passed by Congress.¹³⁵ Because it is not so mentioned and because it is an independent constitutional power, the enabling clause therefore would not grant Congress any special interpretative powers¹³⁶ regarding that doctrine. Therefore, any such legislation spelling out the limits of the right of privacy is entitled to no special deference and, if contrary to the provisions of the ERA, should fall. The same would be true for state legislation because of the supremacy clause of the United States Constitution.¹³⁷

The second suggestion made by Emerson is that prisoners would be viewed as having forfeited their rights of privacy due to their convictions of crimes.¹³⁸ This notion has two fatal flaws: (1) it is not the right of privacy, but rather the ERA that would compel the integration of prisons, and (2) assuming *arguendo* that Emerson's suggestion is valid, it would be applicable only to those few situations in which the participants suffer some civil disability. One does not, for example, give up his rights by choosing to attend college,¹³⁹ and his second suggestion has no relevance there.

Views as to the Federal Legal Aspects of the Right of Privacy, 43 L.Ed. 2d 871 (1975). *But see* Cohen v. California, 403 U.S. 15 (1971) (privacy interests of citizens not great enough to warrant conviction of one who wears a jacket bearing the words "Fuck the draft").

133. *House Hearings*, *supra* note 32, at 402-06.

134. *Id.* at 403.

135. An amendment expressly exempting the right of privacy from the scope of the ERA offered by Sen. Ervin was defeated 11-79. 118 CONG. REC. 9531 (1972). For the text of the proposed amendment, *see id.* at 9529.

136. The Supreme Court has found that the enabling clause of the fourteenth amendment gave Congress special powers in interpreting that amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966).

137. U.S. CONST. art. VI § 2.

138. *House Hearings*, *supra* note 32, at 404.

139. *See Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969).

The third suggestion made by Emerson is that "the right of privacy doesn't extend affirmatively to engage in association with other people."¹⁴⁰ This assertion is both dubious and irrelevant—dubious, because even then-existing case law did not support such an assertion;¹⁴¹ and irrelevant, because, once again, the right of privacy would not be the mandating constitutional instrumentality; the ERA would be.

Emerson's three suggestions bespeak a confusion between the roles of ERA and the right of privacy. Implicit in his comments was the belief that sexual integration of government-operated facilities is an individual right grounded in the right of privacy; instead the ERA would *mandate* governmental sex-blindness in all situations where the *individual* right of privacy did not give the individual (or the government acting on his behalf) the right to be free from the effects of governmental actions in carrying out the mandates of ERA.

A measure of the congressional uncertainty over the scope of the right of privacy is that Representative Edwards ascribed a different scope to the right. He did not view the right as allowing sexual segregation of correctional facilities,¹⁴² although he did suggest that the "power of the state to prohibit cohabitation by unmarried persons" would prohibit the mixing of individuals of opposite sexes in single cells.¹⁴³

No mention, however, is ever made in the debates of the source of that power. Arguably, this prohibition is a classification based upon sex, much as miscegenation statutes are based upon race,¹⁴⁴ and should therefore be prohibited unless some source is indicated for that power. No suggestion was made during the debates suggesting any rationale for the source of this power, other than a statement that this exception, like the right of privacy, does not violate "the principle of equality."¹⁴⁵

IV. THE INTENT OF CONGRESS—THE IMPLICIT SECOND STANDARD

The third exception suggested by Congress would appear to be the most analytically sound of the three enumerated exceptions. Although the ERA generally rejects the idea of sex-based classifications, it "does not require that women must be treated in all respects the same as men. Equality does not mean 'sameness.'"¹⁴⁶ As a result the ERA "would not prohibit reasonable classifications based on characteristics that are unique

140. *House Hearings*, *supra* note 32, at 404.

141. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), which reversed the conviction of a licensed physician and the director of a Planned Parenthood League for giving information on contraception to married couples. Since the privacy interest which invalidated the statute was the right of the married couples, it necessarily follows that the couples had a right of association with those who would provide them with information on contraception, based upon the right of privacy. *See also* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

142. 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

143. *Id.*

144. *See* *Loving v. Virginia*, 388 U.S. 1 (1967).

145. HOUSE REPORT, *supra* note 43, at 7.

146. *Id.*

to one sex."¹⁴⁷ Although this rationale will be discussed again,¹⁴⁸ it is reasonable to assert that a classification based upon the unique physical characteristics of one sex does not deny equality because such a classification is dealing with the attributes of individuals.¹⁴⁹ In addition, if there is a close nexus between the unique physical characteristic and the classification, the danger of the reemergence of legal discrimination is minimal.

The rationale for the third exception, barely articulated, arises both from the nature of equality and an ambiguity in the text of the ERA. As the statements dealing with the unique physical characteristics [UPC] exception indicated, equality will allow dissimilarity of treatment when there are actual, legally cognizable differences between classes. What further underlines this exception is the ambiguity inhering in the word "sex," which can mean either the state of being male or female or can mean the complex of physiological and behavioral traits tending toward genital union and reproduction. For purposes of this analysis the two definitions will hereafter be termed "Sex I" and "Sex II" respectively. The purpose of the ERA can be summarized by saying that a Sex I classification by itself is not valid; that is, the fact of being male or female standing alone can never justify a legal classification. UPC analysis indicates that Sex I classifications *can* be valid if there is in addition one other factor: a physical trait unique to one sex.

Moreover, the examples given in the debates of unique physical characteristics, *e.g.*, sperm donation,¹⁵⁰ forcible rape laws,¹⁵¹ and childbearing,¹⁵² all have an origin in the Sex II realm: all relate to biological adaptations for reproduction. The same may be said for all other unique physical characteristics of each sex.

The rationale for this second standard is apparent; if we are to regulate any gender differences, it must be on the basis of being male or female, so that a Sex I classification is present. In this context, however, the Sex I classification is material,¹⁵³ because of the presence of the Sex II characteristic. Neither should such regulation be seen as a denial of equality, because we would not be classifying on the basis of an overbroad category.¹⁵⁴ Clearly, then, if a Sex II consideration is present, the rigid prohibition against Sex I classifications is no longer applicable.¹⁵⁵

147. *Id.*

148. See Section V *infra*.

149. *Cf.*, *e.g.*, 117 CONG. REC. 35791 (1971) (remarks of Rep. Ryan): "The basic principle underlying [the ERA] is that legal rights must be determined by the actual attributes of an individual, not by sex." Here, however, "sex" is an actual attribute of the individual.

150. 117 CONG. REC. 35312 (1971) (remarks of Rep. Abzug).

151. 118 CONG. REC. 9536 (1972) (remarks of Sen. Bayh).

152. 117 CONG. REC. 35312 (1971) (remarks of Rep. Abzug).

153. *Cf.*, *e.g.*, 118 CONG. REC. 9550 (1972) (remarks of Sen. Gambrell): "I think the majority of American men and women support the elimination of discrimination against women, purely on the basis of sex, in areas where an individual's sex is immaterial."

154. *Cf.*, *e.g.*, SENATE REPORT, *supra* note 43, at 12: "The law may operate by grouping individuals in terms of existing characteristics or functions, but not through a vast-overclassification by sex."

155. *Cf.*, *e.g.*, 118 CONG. REC. 9550 (1972) (remarks of Sen. Gambrell): "To me the amendment

One caveat is in order. However analytically sound this exception is, some of the effects ascribed to it by ERA proponents do not follow from it. Senator Bayh, for example, suggested that laws prohibiting the use of obscene language to female telephone operators¹⁵⁶ or in the presence of women,¹⁵⁷ laws forbidding seduction under the promise of marriage,¹⁵⁸ statutory rape laws,¹⁵⁹ and the Mann Act¹⁶⁰ would all be upheld under this exception. A disinterested viewer, however, is unlikely to find any trait of women or of men to uphold these statutes under any principled analysis. Bayh was on safer (but still uncertain) ground when he asserted that forcible rape laws would be upheld under this exception.¹⁶¹ Certainly there would be unique physical characteristics arguably relating to this classification,¹⁶² and the nexus between those physical traits and the classification is direct.

The implicit standard may also be applied to the two other exceptions. The "right of privacy" situations spoken of by Congress typically concern areas viewed as "sexual,"¹⁶³ that is, the functions involved (eliminary functions, dressing, undressing, sleeping) are typically done in the presence of one's own sex or with intimates of the opposite sex. Similarly the right of the state to regulate cohabitation and sexual activity clearly implicates Sex II considerations. If we accept an implicit second standard for Sex II classifications, the source of power for this exception is readily seen.

In addition, this suggested analysis would allow the state to prohibit homosexuality¹⁶⁴ and homosexual marriages,¹⁶⁵ as suggested by Senator Bayh. Otherwise, the only justification would be the rather weak argument that a ban upon homosexual activities is based upon the unique physical characteristics of men and women requiring a partner of each sex for reproduction. In an age when contraception has severed the nexus between sexual activity and reproduction, that argument has the ring of the child's "because"—a "because" for no real reason.

It is important to note what this analysis does not suggest: it does not

means that legal distinctions based solely upon sex are prohibited, except in instances where sex as such is the matter under consideration."

156. See 118 CONG. REC. 9536 (1972) (remarks of Sen. Bayh), replying to assertion of Sen. Ervin that such statutes would be struck down. *Id.* at 9531 (remarks of Sen. Ervin).

157. *Id.* at 9536 (remarks of Sen. Bayh).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* Sen. Bayh suggests that "both the group which is protected, namely, women, and the group which can be punished, namely men, have unique physical characteristics which are directly related to the crime, to the act for which an individual is punished (punctuation as in original)." He does not suggest whether the presence of a unique physical characteristic is required for both classes to enable the statute to be upheld.

163. *Cf., e.g.,* 118 CONG. REC. 9530 (1972) (remarks of Sen. Ervin): "It is clear . . . that the only reason that this Nation has separate restrooms for men and women and boys and girls and separate prisons for men and women prisoners is sex." It is not clear which definition of "sex" Ervin intended.

164. *Id.* at 9331 (remarks of Sen. Bayh).

165. *Id.*

suggest that the ERA allows the state unlimited discretion in the area of Sex II.¹⁶⁶ It does not suggest that the state may justify any legislation by an oblique reference to a Sex II characteristic or area of activity. There must be a *reasonable relationship*¹⁶⁷ between the regulation and the Sex II trait.

V. THE APPLICATION OF THE ERA

The implicit second standard suggests a three-tiered process in the adjudication of ERA questions. Before the analysis could be reached in an actual case, a threshold issue presents itself: Is the challenged action "state action"?¹⁶⁸ The doctrine of state action is as implicit in the text of the ERA¹⁶⁹ as it is in the text of the fourteenth amendment¹⁷⁰ and it was clearly intended by Congress that the ERA have the same "state action" requirement as the fourteenth amendment.¹⁷¹

Assuming state action, the first question to be asked is whether a given classification is based upon Sex I, that is, whether it distinguishes between men and women. This inquiry ordinarily should be an easy question to answer, since any statute using the terms "men" or "women" (except "man" or "men" used in a generic sense or in a context that applies equally to all persons, as "any man or woman") does so classify; so also would any term that has as a component of its meaning maleness or femaleness: for example, mother, father, son, daughter, niece, or nephew.¹⁷²

Any classification based upon a unique physical characteristic would likewise be a classification based upon the fact of being male or female. Differential impact upon the sexes by a classification, however, should not in itself make a classification a Sex I classification,¹⁷³ though such a classification might be subject to attack under other constitutional provisions¹⁷⁴ or federal or state law.

166. *Id.* Sen. Bayh would require that the state ban homosexuality or homosexual marriages by both sexes if any homosexuality or homosexual marriages were banned.

167. The term "reasonable relationship" is used here in its ordinary sense and is not meant to imply any standard of scrutiny similar to equal protection analysis.

168. The doctrine of state action arose in the context of the interpretation of the fourteenth amendment as a result of the decision in the Civil Rights Cases, 109 U.S. 3 (1883). In short, the doctrine is that the guarantees of the fourteenth amendment shield individuals from governmental actions, and not from the actions of private individuals. *See, e.g.,* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1147 (1978).

169. *See* note 1 *supra*: "Equality of rights shall not be denied . . . by the United States or any State . . . (emphasis added)."

170. *See* U.S. CONST. amend. XIV, § 1, which provides, *inter alia*: "No State shall make or enforce any law which will abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . (emphasis added)."

171. *See, e.g.,* SENATE REPORT, *supra* note 43, at 11; HOUSE REPORT, *supra* note 43, at 7.

172. Occasionally one of these words will be used in a non-Sex I context, as, *e.g.,* "radon daughters." This does not destroy the general validity of this analysis.

173. *See, e.g.,* SENATE REPORT, *supra* note 43, at 12: "The law may operate by grouping individuals in terms of existing characteristics or functions, but not through a vast-overclassification by sex."

174. A classification might be without rational basis and thereby subject to attack under the equal protection clause of the fourteenth amendment. Similarly, the evolutionary growth of the ERA

Anti-discriminatory legislation forbidding discrimination on the basis of sex would not be a classification based upon Sex I. It would not classify on the basis of being male or female, but rather would be a classification upon the basis of discriminatory and nondiscriminatory conduct. Judicial remedies on the basis of such legislation would also not be sexual classifications since they would be granted to specific individuals for discriminatory acts committed against them. The fact that the remedy may favor females, for example, is a result of the discriminatory conduct itself, not the legislative classification.¹⁷⁵

Quotas of any sort, however, would be a Sex I classification. Obviously any ratio of men to women, even the fifty-fifty ratio upheld by the *Marchioro* court,¹⁷⁶ classifies on the basis of being male or female rather than on an individual basis.

Once a Sex I classification is found, the next step in the analysis is to determine if a Sex II element is present. As previously explained,¹⁷⁷ Sex II factors are those dealing with reproduction, sexual activities, physical characteristics unique to one sex, and those activities viewed as "sexual" because they are traditionally done only in the presence of intimates of the opposite sex.

If the classification has Sex II elements, further analysis is needed. If the classification does not have Sex II elements, the inquiry is finished. The statute making the Sex I classification should be per se unconstitutional.

This per se unconstitutionality accords well with the effects of the ERA as envisioned by Congress; for all the classifications that fall within this sphere would be unconstitutional, according to Congress. Women would be subject to the military draft¹⁷⁸ and would be allowed to volunteer for military service on the same basis as men.¹⁷⁹ In addition, exemptions from the draft would have to be sex-neutral.¹⁸⁰ It does seem apparent that women physically qualified to do so might be sent into combat, though some ERA proponents were less than candid on this point.¹⁸¹

might subject classifications with differential sexual impact to a more stringent scrutiny, but no such standard was suggested in the debates.

175. Cf., e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

176. See notes 110-15 and accompanying text *supra*.

177. See Section IV *supra*.

178. SENATE REPORT, *supra* note 43, at 13; 188 CONG. REC. 9344 (1972) (remarks of Sen. Fong); *id.* at 9336 (remarks of Sen. Gurney); *id.* at 9317 (remarks of Sen. Stennis); *id.* at 9091 (remarks of Sen. Ervin); *id.* at 8907 (remarks of Sen. Cook); *id.* at 8903 (remarks of Sen. Bayh); 117 CONG. REC. 35796 (1971) (remarks of Rep. O'Neill); *id.* at 35788 (remarks of Rep. Abzug); *id.* at 35784 (remarks of Rep. Wiggins); *id.* at 35325 (remarks of Rep. Harrington); *id.* at 35316 (remarks of Rep. Dennis); *id.* at 35313 (remarks of Rep. Sandman); *id.* at 35311 (remarks of Rep. Abzug); *id.* at 35307 (remarks of Rep. Edwards); *id.* at 35296 (remarks of Rep. Griffiths).

179. SENATE REPORT, *supra* note 43, at 13; 118 CONG. REC. 8907 (1972) (remarks of Sen. Cook); *id.* at 8903 (remarks of Sen. Bayh); 117 CONG. REC. 35309 (1971) (remarks of Rep. McClory); *id.* at 35311-12 (remarks of Rep. Abzug).

180. 118 CONG. REC. 9332 (1972) (remarks of Sen. Bayh); 117 CONG. REC. 35310 (1971) (remarks of Rep. McClory).

181. 117 CONG. REC. 35325 (1971) (remarks of Rep. Harrington); *id.* at 35311 (remarks of Rep. Abzug). *Contra*, 118 CONG. REC. 9336 (1972) (remarks of Sen. Gurney).

The prevailing view of the influential proponents was that few women would qualify physically

Protective labor laws applying to women only would be struck down¹⁸² or extended to men if they were truly beneficial.¹⁸³ Laws providing special exemptions from jury duty for women would be unconstitutional,¹⁸⁴ as would laws imposing greater penalties for one sex than the other for the same offense.¹⁸⁵ The social security system would not be able to set different ages of retirement for men and women.¹⁸⁶

It is important to note that several of the suspect statutes are, or might be characterized as, benefits to women: lower retirement age, truly beneficial protective labor laws, and special exemptions from jury service. A benevolent intent toward women, however, would be irrelevant to this analysis; a special benefit to women under the ERA would be extended to men, or, if that were not practicable, struck down.

This per se unconstitutionality of any non-Sex II classification of men and women is the only sure way of meeting the policy goals of the ERA, expressed as a concern for the individual without regard for the Sex I nature of his or her being. If the fact of sex (Sex I) is irrelevant except in certain narrowly circumscribed areas of life, as ERA proponents believe, then all classifications outside the areas of relevance lack any rational foundation. This is true even if a given trait sought to be regulated is found statistically more often in one sex than the other, for the proper classificatory basis should be the given trait itself.¹⁸⁷

When one enters the realm of Sex II, the differences between men and women become relevant again. The state's need to regulate aspects of sexual behavior is particularly apparent in relation to marriage and domestic relations. The state's role in regulating the property of spouses and its devolvement to their offspring, and its general role in allocating civil status to its members, confer on it the power to regulate to some extent sexual behavior, reproduction, and its physical concomitants. Recent developments in the right of privacy have not greatly eroded that power.

Clearly Congress intended such regulation to continue under the ERA, which does not disturb these regulations with one exception: they must be applied equally to both sexes, that is, neither burdens nor benefits can apply to one sex and not to the other. In other words, a Sex I

and service in combat zones would be largely at the discretion of the military services. *See, e.g.*, 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards): "Women in the military could be assigned to serve wherever their skills or talents were applicable and needed, in the discretion of the command. . . ." For similar remarks, see also SENATE REPORT, *supra* note 43, at 13-14; HOUSE REPORT, *supra* note 43, at 7; 118 CONG. REC. 8907 (1972) (remarks of Sen. Cook). No doubt the proponents saw this effect of the ERA as a political liability and sought to minimize its impact.

182. 117 CONG. REC. 35320 (1972) (remarks of Rep. Heckler); *id.* at 35309 (remarks of Rep. McClory).

183. SENATE REPORT, *supra* note 43, at 15; 118 CONG. REC. 9336 (1972) (remarks of Sen. Gurney); *id.* at 8903 (remarks of Sen. Bayh); 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

184. 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

185. SENATE REPORT, *supra* note 43, at 16; 118 CONG. REC. 9335 (1972) (remarks of Sen. Gurney); *id.* at 8904 (remarks of Sen. Bayh); 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

186. 117 CONG. REC. 35790 (1971) (remarks of Rep. Sandman).

187. *See, e.g.*, HOUSE REPORT, *supra* note 43, at 6.

classification with a reasonable relationship to a Sex II element is valid if it impinges equally upon both sexes.

To apply this criteria to the consequences foreseen by Congress is to demonstrate its soundness. For example, in the area of domestic relations, child support would be the responsibility of both parents, rather than the primary responsibility of the father.¹⁸⁸ The sexes would have equal responsibility for alimony if circumstances warranted it.¹⁸⁹ Grounds for divorce would also have to be identical.¹⁹⁰

The ERA would eliminate the presumption that custody of the children should be awarded to the mother after the end of a marriage.¹⁹¹ Similarly, restrictions on the property rights of married women would be struck down,¹⁹² and married women would be able to manage their separate property as their husbands do.¹⁹³ Dower rights would be equalized,¹⁹⁴ and the failure of the social security system to grant survivorship benefits to widowers (as it does to widows) would be rectified.¹⁹⁵

This second tier also makes explicable what would otherwise be obscure. Under this implicit second standard, the power to regulate cohabitation and premarital sexual activity is no longer "[w]ithout father, without mother, without descent,"¹⁹⁶ a power without an identifiable source. Instead, such statutes become valid Sex I classifications with a reasonable relationship to a Sex II element, and because they impinge equally upon the two sexes, they are valid under the ERA.¹⁹⁷ The same analysis also supports what Congress denominated "the right of privacy," and some of the remarks made by ERA proponents indicate an analysis similar to the one suggested that this Comment was operating *sub rosa*.¹⁹⁸

188. 118 CONG. REC. 9372 (1972) (remarks of Sen. Kennedy); *id.* at 9331, 9523 (remarks of Sen. Bayh); 117 CONG. REC. 35808 (1971) (remarks of Rep. Sullivan); *id.* at 35789 (remarks of Rep. Abzug); *id.* at 35325 (remarks of Rep. Reid); *id.* at 35309 (remarks of Rep. McClory).

189. 118 CONG. REC. 9523 (1972) (remarks of Sen. Bayh); *id.* at 9337 (remarks of Sen. Ervin); *id.* at 8906 (remarks of Sen. Cook); 117 CONG. REC. 35789 (1971) (remarks of Rep. Abzug); *id.* at 35325 (remarks of Rep. Reid).

190. 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

191. 118 CONG. REC. 8905 (1972) (remarks of Sen. Cook); 117 CONG. REC. 35325 (1971) (remarks of Rep. Reid); *id.* at 35307 (remarks of Rep. Edwards).

192. 117 CONG. REC. 35307 (1971) (remarks of Rep. Edwards).

193. *Id.*

194. 118 CONG. REC. 9523 (1972) (remarks of Sen. Bayh); *id.* at 8905 (remarks of Sen. Cook).

195. 118 CONG. REC. 8905 (1972) (remarks of Sen. Cook). Such failure to grant survivorship benefits to widowers was declared unconstitutional in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

196. *Cf. Hebrews 7:3*.

197. This should not be taken as implying that the classification would survive other constitutional attacks, such as an attack based upon the individual's rights of privacy.

198. *See, e.g.*, 118 CONG. REC. 9531 (1972) (remarks of Sen. Cook):

What I do not understand, if the logic of the Senator from North Carolina is correct, is this. He said if I had all of these constitutional rights up to now as a man, and a woman has not, that I had the right to go into the lady's restroom. But as a matter of fact today if a man goes to a lady's restroom he gets arrested. We do not have that right.

If the theory of the Senator is correct that it is as clear as the sun in a cloudless sky with respect to what we are talking about, it must be a rainy day, such as today, when we cannot see

This standard would also allow the prohibition of homosexuality¹⁹⁹ and homosexual marriages,²⁰⁰ as suggested by Senator Bayh. Because the standard requires equal impingement on the two sexes, the state must, if it prohibits the activity by one sex, prohibit it by the other sex, just as Senator Bayh suggested.²⁰¹

The last stage in the analysis concerns Sex I classifications with Sex II elements with unequal impingement upon the two sexes. Such a classification would be valid only if a unique physical characteristic were involved, and if the Sex II element (the unique physical characteristic) bore a reasonable relationship to the Sex I classification. Statutes valid under this standard would include forcible rape laws,²⁰² regulations concerning sperm banks,²⁰³ and laws providing benefits for childbearing.²⁰⁴ The nexus between the unique physical characteristics must be close: for example, the fact that only women can bear children would not allow the state to provide benefits to women only for childrearing.²⁰⁵

Some of the effects ascribed to this UPC analysis do not fit the standard offered here, but neither do they fit the explicit analysis made in the congressional debates. As mentioned previously,²⁰⁶ Senator Bayh's analysis of criminal statutes forbidding the use of obscene language to female operators²⁰⁷ or in the presence of females,²⁰⁸ or forbidding seduction under promise of marriage,²⁰⁹ as well as statutory rape laws,²¹⁰ and the Mann Act,²¹¹ are not explicable under the criterion he himself set forth. Certainly, all could be written in a sex-neutral way and the better part of valor would suggest such revision if the ERA is ratified.

VI. CONCLUSION

The ERA is bottomed upon the idea that distinctions between men and women are generally legally irrelevant. Congress intended that the

the sun. It is said I have had these rights all along and we are giving equal rights under the Constitution which, in essence, means we have not been doing it up to now.

If I had more rights than the feminine sex, and my rights were equal with my brethren, and equal to the rights of women, then I had the right to utilize both of these facilities, but she only had the right to use one facility. Obviously, this is not the case.

199. 118 CONG. REC. 9331 (1972) (remarks of Sen. Bayh). The leading Senate opponent suggests differently. *Id.* at 9315 (remarks of Sen. Ervin).

200. *Id.* at 9331 (remarks of Sen. Bayh). Once again Ervin suggested this would not be the case. *Id.* at 9315 (remarks of Sen. Ervin).

201. *Id.* at 9331 (remarks of Sen. Bayh).

202. SENATE REPORT, *supra* note 43, at 16; 118 CONG. REC. 8904 (1972) (remarks of Sen. Bayh); 117 CONG. REC. 35296 (1971) (remarks of Rep. Griffiths).

203. 117 CONG. REC. 35801 (1971) (remarks of Rep. Mitchell).

204. *Id.* at 35797 (remarks of Rep. Drinan).

205. *Id.*

206. See notes 156-60 and accompanying text *supra*.

207. 118 CONG. REC. 9536 (1972) (remarks of Sen. Bayh).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

ERA could best combat sex discrimination if interpreted to preclude all sex-based classifications with three exceptions: what Congress called "the right of privacy," "unique physical characteristics," and "the power of the state to regulate cohabitation and sexual activity of unmarried persons."

This Comment suggests, however, that there are problems with the congressional schema that can be resolved with an analysis that is inherent in the congressional debates. This analysis concerns the word "sex," which has two separate relevant meanings: "the state of being male or female (for purposes of this Comment, Sex I)," and "the complex of physiological, behavioral, and cultural traits associated with genital union and reproduction (Sex II)."

Under this analysis, Sex I classifications with no relationship to a Sex II element are per se unconstitutional. Sex I classifications with a Sex II element are valid only if they impinge equally upon both sexes, unless a physical characteristic unique to one sex is involved. If a unique physical characteristic is involved, the Sex I classification is valid if it bears a reasonable relationship to the unique physical characteristic.

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